LAW OFFICE OF
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Occupational Safety and Health Administration

Federal Courts Reject Confidentiality of Injury and Illness Records; OSHA Revises Procedures for Accessing Personal Medical Records

By Gary Visscher, Esq.

Since 2017, business establishments with 250 or more employees and establishments with 20 to 250 employees in designated industries have been required to electronically submit their annual summary injury and illness record (Form 300A) to OSHA.

The current requirement, 29 CFR 1904.41(a), is a revision of the rule initially adopted by the Obama Administration in 2016. The original rule required that establishments with 250 or more employees submit not only the annual summary Form 300A, but also Form 300 (log) and 301 (incident report). OSHA stated that, except for personal information such as employee names, the data it collected would be publicly available.

The Trump Administration revised the rule in 2018, including deleting requirements for establishments with 250 or more employees to submit Forms 300 and 301. However, the revised rule retained the requirement for electronic submission of the annual summary, Form 300A, for establishments with 250 or more employees and establishments with 20 to 250 employees in selected industries. Covered employers are now required to submit the previous calendar year's information no later than March 1 of the following year.

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The Trump Administration also said that it did not intend to make the information it collected publicly available. However, shortly after the initial electronic submission deadline, several organizations filed Freedom of Information Act (FOIA) requests. OSHA denied the requests, and the requesters went to court.

Last month a U.S. magistrate for the federal District Court in D.C. issued his report and recommendation upholding the requester's (Public Citizen) right to the injury and illness records. The magistrate rejected OSHA's argument that the records are exempt from disclosure under the FOIA as confidential business records. The magistrate agreed that the injury and illness records are "commercial" in nature, but he concluded that they are not "confidential" as defined by Supreme Court precedent.

OSHA could have filed objections to the magistrate's recommendation but chose not to do so. Instead OSHA agreed to turn over the requested records (the electronically submitted Forms 300A for years 2016-2018) no later than August 18, 2020.

The actions in the DC federal court followed a similar ruling by a U.S. District Court in California, which also denied OSHA's argument that injury and illness records provided to OSHA under the electronic reporting rule are confidential. The requester in the California case was the Center for Investigative Reporting. Unlike Public Citizen's request in the D.C. case, CIR did not request all the records electronically submitted to OSHA, but specifically requested the records submitted by Amazon.

While both decisions granting plaintiffs access to the submitted Form 300A's are district court decisions, and therefore not binding precedent on other courts, the fact that OSHA chose not to file objections indicates that it may no longer reject FOIA requests for this information. OSHA may even decide it is easier (and may soon be required to do so under the FOIA "rule of 3") to publish the injury and illness records on a publicly accessible website.

Separately, in late July OSHA issued a final rule amending its procedures for obtaining and implementing Medical Records Orders, or MROs. MROs are executed during an inspection or investigation, to give OSHA authority to collect and review individual employee medical records and information. The previous regulation and procedures date back to 1980, and the promulgation OSHA's Access to Employee Exposure and Medical Records rule, 29 CFR 1020, and were intended to assure that "if OSHA obtained access to employee medical records, the access should be accompanied by stringent internal agency procedures to preclude abuse of personally identifiable medical information."

COVID-19 Pandemic

Virginia Enacts COVID-19 Emergency Safety Rule

By Adele L. Abrams, Esq., CMSP

The state of Virginia has enacted a new regulation to protect workers in the state from contagion risks arising from COVID-19. The rule, which took effect on July 27, 2020, will be enforced by the state OSHA agency ("VOSH") and applies to private employers and to state/municipal workplaces, but does not apply on federal property in Virginia as that remains under federal OSHA jurisdiction. Virginia Gov. Ralph Northam said that the Virginia rules were being implemented "in the face of federal inaction" adding, "workers should not have to sacrifice their health and safety to earn a living, especially during an ongoing global pandemic."

Prior to adoption of the rule, VOSH had received thousands of complaints from workers in recent months, including claims that employers were

discouraging workers from getting tested and allegations that employers refused to clean workplaces properly after learning of sick workers. In addition to the safety measures addressed below, the rule also includes prohibitions on retaliation against workers who raise safety concerns, don protective gear, or speak out to the government or to media about safety concerns.

Federal OSHA was petitioned to promulgate an emergency temporary COVID standard, but declined to do so, and the Obama-era infectious disease rulemaking stalled following the administration change in 2017. A recent effort by the AFL-CIO in the US Court of Appeals to force federal OSHA to enact a rule was unsuccessful. To date, federal OSHA has only issued a few citations to employers nationwide related to COVID-19, generally under existing recordkeeping or respiratory protection rules.

The new Virginia law tracks closely to the recommendations from the Centers for Disease Control, as well as with some guidance from federal OSHA, but will be enforceable and VOSH can issue civil penalties of up to $124,000 per violation. While VOSH's new rule is the first COVID-unique "OSHA" rule, a dozen states have adopted some degree of workplace safety protections, generally through state executive orders or emergency declarations. Those state orders tend to address worker screening, mask use and social distancing, but do not require additional employer actions such as training or program development.

The Virginia standard is temporary in a sense: it remains in effect for six months but can be made permanent through state law. As a state plan OSHA agency, Virginia can enact more stringent laws than federal OSHA but its programs must be at least as effective as the federal agency. The Virginia rule ranks worksites according to the risk level to workers - low to very high – and requirements are modified accordingly. Health care workers are at highest risk, poultry plants (nearly 400 poultry workers in Va. have tested positive) would be considered at medium risk, as would retail operations.

The rule requires all employers to mandate social distancing measures and requires the use of face coverings for employees in customer-facing positions, as well as when social distancing is not possible. Employees must have frequent access to handwashing facilities or hand sanitizer, and high-contact surfaces must be regularly cleaned. In addition, if a worker tests positive, co-workers must be notified within 24 hours. Workers who are known or suspected to be positive for COVID-19 cannot return to work for 10 days or until they receive two consecutive negative tests.

The Virginia rule ranks worksites according to the risk level to workers - low to very high – and requirements are modified accordingly. Health care workers are at highest risk, poultry plants (nearly 400 poultry workers in Va. have tested positive) would be considered at medium risk, as would retail operations.

Once an employer classifies its worksite tasks into risk groups, then each category has a separate list of precautions to take to prevent COVID infections. These range from stringent personal protective equipment (PPE) and sanitation mandates for high risk situations, to more lenient restrictions for lower risk workers who can achieve minimal occupational contact with other employees, persons, or the public. To designate a task as low-risk, employers will be expected to utilize engineering, administrative and work practice controls, such as floor-to-ceiling barriers, staggered workshifts or remote work where feasible. Employees at "medium" or higher risk would also require training on the worksite's anti-infection measures, with written documentation of compliance. The rule also clarifies that cloth face coverings do not constitute PPE, as the purpose is to prevent spread of COVID-19, rather than protection of the wearer.

While there has been some resistance to the new measures, VA Workforce Development Chief Megan Healy observed: “Our workers are our greatest asset, and I am confident that these temporary standards will provide Virginians with the peace of mind they need to return to work and fuel the Commonwealth’s economic recovery.” Virginia’s Department of Labor & Industry website (doli.virginia.gov) contains infectious disease preparedness and response plan templates, as well as training guidance, for employer assistance and worker information.

For assistance in addressing VOSH or other OSHA compliance issues, contact the Law Office at 301-595-3520.

COVID-19 Pandemic

U.S. Court of Appeals Denies Union Demand for MSHA Emergency COVID Standard

By Josh Schultz, Esq.

In a July 16, 2020 decision, the U.S. Court of Appeals for the D.C. Circuit denied a petition by unions which would have required MSHA to issue emergency temporary standards (“ETS”) regarding the COVID-19 pandemic. The Court was responding to a petition for a writ of mandamus by a group of unions, led by the United Mine Workers of America, which alleged that MSHA’s refusal to issue an ETS constitutes an abuse of agency discretion so blatant as to amount to a clear “abdication of statutory responsibility.”

Section 101(b) of the Mine Act requires MSHA to issue an ETS if the agency determines “that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and (B) that such emergency standard is necessary to protect miners from such danger.”

The United Mine Workers of America originally issued a public letter to MSHA, calling on the agency to issue an ETS to help safeguard mine workers during the COVID-19 pandemic. Additionally, a bi-partisan group of U.S. Senators introduced the COVID-19 Mine Worker Protection Act on May 13, 2020, which would require MSHA to issue an ETS within 7 days of enactment addressing COVID-19 exposure at the mines. The bill has not been brought to the Senate floor for a vote.

In denying the unions’ request to compel an ETS, the Court noted that they were not deciding whether they would see fit to issue an ETS, but whether MSHA’s decision not to issue an ETS "lacks support in the record.” The Court deferred to MSHA’s determination that the agency’s existing mandatory safety and health standards, coupled with other regulatory tools, are broad enough to allow it to “require mine operators to take steps specific at each mine to abate a variety of health hazards, including COVID-19.” The Court further relied on MSHA’s assurances that its existing standards impose COVID-related duties on mine operators and that the agency is issuing citations with respect to COVID-related violations. The Court further stated that “the authority to establish emergency standards . . . is an ‘extraordinary power’ that is to be ‘delicately exercised’ in only certain ‘limited situations.’”

In MSHA’s response to the unions’ petition, they outlined their enforcement response to the pandemic. They noted that the agency has received more than 125 COVID-related complaints and has investigated each complaint. MSHA noted a specific complaint regarding a lack of social distancing and sanitation. In response, MSHA sent inspectors to the mine the same night and required the operator to revise its training plan under Part 48 to address the hazards associated with COVID-19. MSHA further argued that their response to the pandemic has been sufficient because they have issued citations during regular inspections

related to COVID-19 control. Finally, the agency noted that the Mine Act prohibits discrimination or retaliation against miners who complain of COVID-19 hazards, and MSHA has a statutory requirement to investigate all discrimination cases.

Following the ruling, MSHA chief David G. Zatezalo issued a statement, saying "We are pleased with the decision from the D.C. Circuit, which agreed that MSHA reasonably determined that an emergency temporary standard was not necessary in light of the agency's existing mandatory safety and health standards and regulatory tools. MSHA will continue to evaluate the developing situation with COVID-19, enforce the law, and offer guidance to mine operators and miners to keep America's mines safe."

It's worth noting that the court did not close the door on the issue, stating "in view of the ever developing situation with COVID-19, however, the UMWA may renew its administrative petition for an ETS should existing safety procedures prove inadequate."

COVID-19 Pandemic

California State Board to Decide on Emergency Virus Rule

By Josh Schultz, Esq.

California's Occupational Safety and Health Standards Board will decide whether to issue an emergency temporary standard ("ETS") on COVID-19 protections for employees. CalOSHA has recommended the issuance of such a standard, with chief Doug Parker advising the board that the agency "determined there is a "necessity" for a temporary standard to protect workers from COVID-19 and recommended that the board grant the petition.

In a Board Staff Review, dated August 10, 2020, evaluated CalOSHA's request for an ETS. The Board staff concluded new regulations, either emergency or permanent, are not likely to significantly improve employee health and safety outcomes. Senior safety engineer David Kernazitskas noted that "Employers have ready access to credible information to combat exposure to SARS-CoV-2 and are already required to effectively address such challenges in their workplace. Continued enforcement of existing regulations and consultative outreach is a more efficient and likely effective use of the Cal/OSHA's limited resources."

The Board staff recommended denying CalOSHA's request for an emergency standard. The staff recommendation noted that CalOSHA's Aerosol Transmissible Diseases standard (Title 8, Section 5199) directly applies to viruses such as COVID0-19, although the scope of the standard is limited to medical offices, certain laboratories, correctional facilities, homeless shelters, drug treatment programs, and any other employer that Cal/OSHA informs in writing that they must comply with the ATD standard. Further, the staff noted other applicable requirements, including the Injury and Illness Prevention Program (IIPP, Section 3203), Washing facilities (Sections 1527, 3366, 3457, and 8397.4), PPE (Section 3380), Respiratory Protection (Section 5144), Sanitation (Article 9), and Control of Harmful Exposures (Section 5141).

In the petition, CalOSHA noted that Virginia has enacted a COVID-19 emergency standard and that Oregon is currently working on emergency regulations expected to take effect this fall. The Board staff noted that similar standards would conflict with existing CalOSHA regulations. The memo recommending denial of the petition focused on California's performance-based IIPP regulations, which allows employers to respond to "updated worker protection guidelines in a more efficient and responsive manner, which translates into more-effective employee protections."

COVID-19 Pandemic

Federal Court in New York Vacates Portions of DOL's Regulations on COVID Leave Law

By Diana Schroeher, Esq.

On August 3, 2020, the Southern District of New York issued an opinion and order vacating four key provisions of the Department of Labor's (DOL) regulations covering the Families First Coronavirus Response Act (FFCRA), while allowing the remaining provisions to stand unaltered. The Court opinion may have significant impacts, depending on DOL's response, and whether other states respond in kind. But, as it stands, employers should not wait to consider how the opinion may affect the administration of leave practices under the FFCRA.

FFCRA Overview

The FFCRA was passed in response to the global COVID-19 pandemic, and became effective on April 1, 2020. The law covers public and private employers with under 500 employees. The FFCRA provides federally-subsidized Coronavirus-related paid leave under the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA).

The DOL's Final Rule implementing the FFCRA became effective on April 1, 2020 and is effective through December 31, 2020. The regulation provides rules and guidance relevant to the administration of the FFCRA's paid leave requirements.

Under the EPSLA, an eligible employee is entitled to up to 80 hours of paid leave if the employee is unable to work (or telework) due to a need to take leave because:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for an individual who is subject to an order to quarantine or self-isolate or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Under the EFMLEA, an eligible employee may take up to 12 weeks of leave if they have worked for the employer for at least 30 days and are unable to work (or telework) due to a need to care for minor children, if:

- A school or place of care has been closed; or
- The child care provider of such children is unavailable due to a public health emergency (defined as an emergency with respect to COVID-19 declared by a federal, state, or local governmental authority).

Litigation Challenging the DOL's Regulation

The State of New York filed a complaint against the DOL in mid-April alleging the DOL exceeded its authority and failed to act in accordance with the law in

issuing its Final Rule, when placing additional requirements on the employee requesting leave. The Court considered the parties' Motions for Summary Judgment, and on August 3, 2020 issued an order vacating the following provisions of the DOL's Final Rule:

1. The "work-availability" requirement, which imposed an additional requirement that the employer had to have work available for the employee before the employee would qualify for leave under the EPSLA and EFMLEA;

2. The definition of "health care provider", which in the Final Rule the Court found to be "vastly overbroad" resulting in the exclusion of many employees "whose roles bear no nexus whatsoever to the provision of healthcare services";

3. The requirement of obtaining the employer's consent before taking intermittent leave, which the Court found was without reason; and

4. The requirement that employees provide documentation prior to taking leave, which the Court found to be "onerous" and far reaching, and well beyond the basic "notice" requirement set forth in the FFCRA.

Takeaways

At first glance, the New York Court order may appear to have a narrow reach, but the scope of the opinion may well be far-reaching. The DOL has not responded to the Court's opinion, which could be in the form of an appeal, seeking reconsideration and/or a stay pending the appeal, or an appeal to the Second Circuit Court of Appeals, or the DOL could decide to reissue a regulation consistent with the Court's order vacating the four provisions. This Court order could trigger other jurisdictions to follow suit, initiating new actions against the DOL. Given the uncertainty, employers should take time now to understand how the Court order modifies the administration of leave under the FFCRA. For more information, or assistance navigating any COVID-19 related or employment issues, please contact Diana Schroeher at the Law Office.

The SVEP program has continued (or at least was not formally terminated to date), but press releases have diminished under the Trump administration. SVEP status is determined based on issued citations (rather than those finally adjudicated where the employer is found to have committed the alleged violations). Normally, SVEP is triggered by a number of high hazard, high negligence violations – very often involving OSHA National Emphasis Program inspections or accident investigations – or where OSHA determined that the employer was an "egregious" violator (where multiple employees were exposed to the hazard and separate penalties are issued for each).

In 2016, OSHA finalized its electronic recordkeeping rule (E-recordkeeping), and among the provisions was submission of injury/illness data by larger employers and smaller ones in high-hazard sectors. The original plan was to publish this data on the OSHA website, to be searchable by employer name in the same manner as one can now search for violation history.

The goal was said to be "behavioral economics" – that if employers' injury/illness experience was made public, where it could be viewed by the community, prospective employees, and even competitors – employers would have incentives to reduce injury rates. However, after the change in administration, OSHA reversed its position and held that it would not make the injury/illness data publicly available. Litigation over this issue is still pending in the federal courts.

Now the validity of OSHA "behavioral economics" theory has been studied by Duke University's Sanford School of Public Policy. The analysis, "Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws," will be published in the forthcoming edition of *American Economic Review*. The study focused on the OSHA SVEP program and the agency's general 2009 policy

that any cases involving citations with fines of $40,000+ would trigger press releases. The releases were sent to local media outlets and industry trade publications related to the employer/worksite, to increase publicity.

The researcher, Matthew Johnson, found that after an OSHA press release is issued, there are over 300 inspections of other facilities in the same industry within a 31-mile radius. For the typical press release, a 30 percent decrease in violations was observed. Another study, referenced by Johnson, showed that a typical OSHA inspection leads to 48 percent fewer violations after a later inspection at the same facility. Johnson also found that after the press release was issued concerning the initial employer, there were 73 percent fewer violations among employers in the same industry within 3 miles of the offending employer's location.

The study concludes that a single OSHA press release has the same impact as 210 OSHA inspections, in part because the SVEP policy significantly changed the frequency of media coverage of OSHA. Given the current limitation of OSHA resources and the record-low number of inspectors, Congress reported in 2019 that OSHA can inspect each worksite under its jurisdiction once every 165 years. The press releases remain an effective way to leverage OSHA's resources without additional on-site inspections. Whether they will be restored in the next administration remains to be seen.

Mine Safety and Health Administration

MSHA News Alert: Falls Can Kill!

By Sarah Ghiz Korwan, Esq. and Michael Peelish, Esq.

On the mine site, big falls often mean death, but even a small fall can lead to serious injury. MSHA recently issued a News Alert with an astonishing statistic: 28 miners have died after falling from heights over the last 10 years. Additionally, deaths from falls have increased from 8% to 19% of mining fatalities in the last two years. These deaths most frequently occurred when working without fall protections on top of trucks, in aerial lift baskets and while accessing and egressing other mobile equipment. Falls also commonly occurred while performing maintenance on crushers, screens, conveyors, and other milling equipment.

Several years ago, the National Institute for Occupational Safety and Health (NIOSH) did a study of MSHA fatal reports to determine the causes and contributing factors that led to fatal falls in the mining industry. NIOSH found that most fatal falls occurred during maintenance and repair and during installation, construction, or dismantling operations. Miners affected were most often categorized as laborers, equipment operators, mechanics, and truck drivers. Failure of the walking/standing surface, falling though an opening, and unexpected movement of equipment or ground were the leading causes.

MSHA issued 92 imminent danger orders for miners working at heights without fall protection between January 2019 and June 2020. The most common violations were truck drivers climbing atop their vehicles, and maintenance and quarry personnel climbing to or working without fall protection in high places. The most notable statement in this alert was that supervisors have been ordered down from dangerous locations.

Why is this requirement so often ignored by operators? Our sense is that miners are not trained in accessing

fall hazards and how to manage these hazards. Also, miners, including supervisors, do not believe their actions will lead to an accident.

Here are some of best practices to consider: Reduce hazards by designing work areas to minimize fall hazards by providing mobile or stationary platforms or scaffolding at locations and on work projects where there is a risk of falling. Also, use the right ladder for the job and remember, a ladder is neither a platform nor scaffold. Don't allow miners to stand on the top four rungs of an extension ladder!

Also, all miners who may be working at an elevated height or a location unprotected by handrails should be provided harnesses and lanyards. A body harness distributes the force of a fall to the buttocks, and the chest strap must be on top of the chest but not on the throat. Make sure all the straps, buckles and clips are attached according to the manufacturer's recommendations every single time. Women have narrow body frames, therefore, the straps should not be too wide to fit properly or the fall impact may not be distributed properly or fail to prevent falling out of the harness. In addition, provide identifiable, secure anchor points to attach lanyards.

Just as important as providing fall protection, is correct use. A fall-protection program is useless if workers don't know how to correctly use the equipment. Maximize your equipment investment with task training and site-specific hazard training that prohibits working at unprotected locations or without fall protection. Any fall prevention and protection program must address the applicable fall protection systems for your mine such as fixed barriers, guardrails, surface covers, slip and trip hazards, travel restraints, fall arrest systems, and safety racks. Also, miners must be trained in the proper use of fall prevention and protection systems and devices and the inspection and maintenance of these systems.

Consistent monitoring by supervisors, shift leaders and safety directors, training and enforcement are critical. Operators must also have safe work-at-height policies and procedures with supervisors, miners, contractors, and truck drivers. Be sure workers are following a maintenance schedule by keeping a timely and accurate record of inspections. There must also be consistent monitoring via workplace exams, as well as warnings and/or discipline, where needed.

Under OSHA, fatalities caused by falls from elevation continue to be a leading cause of death for construction employees, accounting for 320 of the 1,008 construction fatalities recorded in 2018 (BLS data). To bring greater resolve to the construction industry, OSHA and the construction industry have been conducting National Safety Stand-Downs to prevent falls. The 7th Annual Stand-Down will be held September 14 through 18, 2020. These OSHA stand down events have reached thousands of employees and have reduced the number of fatalities dramatically, however not enough.

Perhaps, mine operators could implement their own Fall Protection Safety Stand-Down this summer and bring more resolve to the mining industry. Protecting your workers calls for well-defined safety procedures, quality equipment, training, and worker compliance. And ultimately, worker safety will directly translate to cost-savings for your operation. The last thing anyone ever wants to say after an accident is that "I wish I would have..."

Occupational Safety and Health Administration

Aluminum Shapes – A Cautionary Tale About Settlement Agreements

By Gary Visscher, Esq.

So, you (or your attorney) have finally "hammered out" terms in a settlement agreement with OSHA. The settlement agreement provides, among many other terms, that during the following six months, OSHA may

conduct two "monitoring visits" to ensure that the corrections to the cited items have been implemented. The terms of the "monitoring visits" are specified: if OSHA determines that the corrections are not being made or complied with, OSHA will provide a written notification, and "the Parties will enter good faith discussions to resolve the issues." OSHA may observe for other non-compliant conditions "in plain view" during the verification visit, and may conduct additional inspections in response to a complaint or referral.

Near the end of the six-month period, OSHA compliance officers arrive at your workplace, but they inform you that they are there to conduct a "follow up inspection." You ask whether a "follow up inspection" is the same as a "monitoring visit," and, importantly, whether the limitations agreed upon for "monitoring visits" – including the "right to fix" any alleged non-compliance - apply. The inspectors only repeat that they are there to conduct a follow up inspection.

Something like that is the background of a case recently before the OSH Review Commission. In *Aluminum Shapes*, OSHA and the employer entered into a settlement agreement providing that OSHA could conduct two "monitoring visits" for compliance with the terms of the settlement of citations issued in 2015. In January 2017, near the end of the 6-months provided for such visits, three OSHA compliance officers arrived to conduct a "follow up" inspection. Representatives for the employer objected to any inspection outside the terms of the settlement agreement, and both sides' attorneys were contacted. Eventually they agreed that the compliance officers could "enter the premises and do the inspection," and they would work out later whether citations could be issued.

The inspection that began on January 23 lasted for several weeks, and eventually resulted in 51 citations and a proposed penalty of over $1.9 million. The citations and penalty were contested. The employer filed a motion to suppress evidence, claiming that OSHA had failed to comply with the terms of the settlement agreement in undertaking the inspection. The ALJ agreed that evidence from the initial entry on January 23 and 24 should be suppressed, but denied the motion to suppress evidence of violations within plain view during OSHA's January entries of the workplace and evidence from entries beginning February 1, when the six month period had ended.

The employer also asserted defenses for breach of the settlement agreement and for "equitable estoppel" for failing to comply with the settlement agreement. The ALJ dismissed that affirmative defense, on the basis that OSHRC does not have jurisdiction to review or enforce settlement agreements.

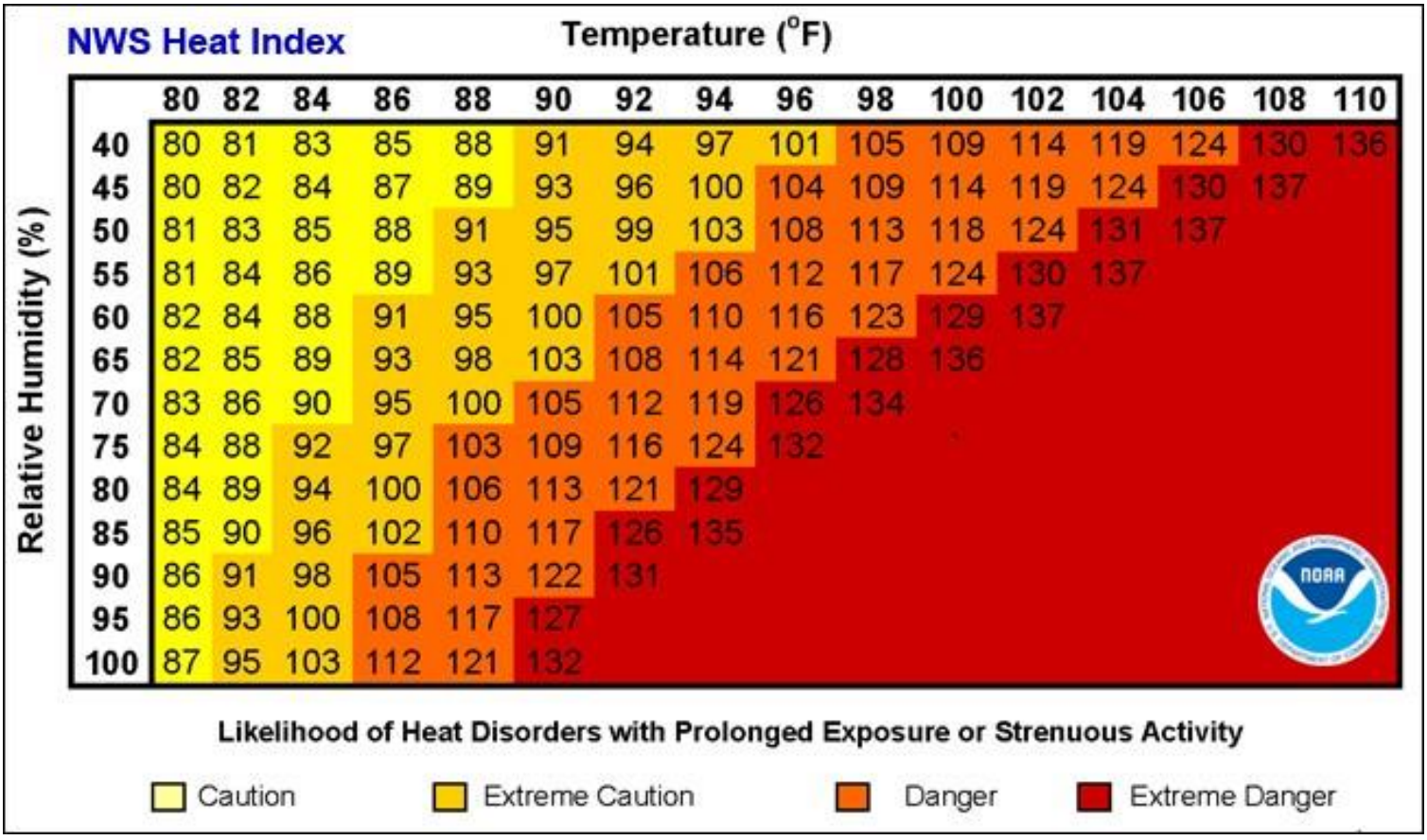
Granting interlocutory appeal, the Review Commission agreed with the ALJ that OSHRC does not have jurisdiction to review or enforce settlement agreements. However, the Commission found that the equitable estoppel defense should be allowed, finding that the essence of the equitable estoppel defense by the employer was not to enforce the settlement agreement but "the failure to adhere to the agreement as evidence of affirmative misconduct" by OSHA. The case was returned to the ALJ for further proceedings.

Equal Employment Opportunity Commission

OSHA Use of NWS Chart for Heat Stress Invalidated

By Adele L. Abrams, Esq., CMSP

On July 15, 2020, OSHRC Judge Sharon Calhoun issued a decision that will have major implications for OSHA's ability to issue General Duty Clause citations to employers who fail to protect workers against the hazards of heat stress. In litigation between OSHA and the US Postal Service, the Administrative Law Judge held that OSHA failed to prove that the National Weather Service (NWS) heat index chart – familiar to people who use it to benchmark the "pain" of summer



heat when combined with high humidity – has a scientific basis.

In addition to showing using the heat/humidity factors for an index number, the NWS also rated certain combinations with differing degrees of danger, ranging from "caution" to "extreme danger." OSHA has relied upon this NWS index when issuing citations as a way of imputing knowledge to employers. OSHA currently has no heat stress standard, although three state-plan states do address the issue with specific rules (California, Minnesota and Washington State). Recently, OSHA lost another heat stress case, *A.H. Sturgill Roofing*, when the OSHRC vacated the general duty clause citation issued after a 60 year old worker collapsed and died on the job. See https://www.oshrc.gov/assets/1/18/A.H._Sturgill_Roofing_Inc.%5E13-0224%5EComplete_Decision_signed%5E022819%5EFINAL.pdf?8324

The latest case involved five general duty clause citations issued to USPS in four states, and OSHA introduced the NWS heat index as evidence. USPS argued that the index should be disregarded as lacking a scientific basis, demonstrating that the chart's "hazard" ratings were based on an article by scientists with no qualifications in human physiology. ALJ Calhoun found that OSHA failed to provide any supporting data for why the levels of risk [in the chart] are attributed to their respective temperatures." At this time, it was unclear whether OSHA would appeal the decision to the full Occupational Safety & Health Review Commission. ALJ decisions do not constitute binding precedent unless affirmed by OSHRC.

Occupational Safety and Health Administration

The State of the Mining Industry

By Michael Peelish, Esq.

Assistant Secretary Zatezalo lays out the facts and pulls no punches and that is why these MSHA Stakeholder meetings are worthwhile. His leadership staff does the same. This was evidenced by the exchange regarding holding or not the remaining nine mine rescue contests and the lack of Covid-19 reports in the mining industry.

The nine fatal accidents statistics in 2020 show some clear trends that involve small mines (less than 7 employees) in the sand and gravel industry (5 fatalities), miners (4 of 9 were contractors) with less experience (less than 2 years) involving fall protection (3 fatalities), and powered haulage (2 fatalities), often involving slip, trip and falls. There has been improvement in powered haulage, however not good enough, and there have been no electrical fatalities through the first six months.

MSHA specialists provided a detailed review of slip and fall and fall protection accidents. Fall protection encompassed safe access to/from mobile equipment, falling off when working from elevated platforms, safe access on platforms and around shafts, and falling from truck trailers. You can bet that MSHA inspectors will be paying special attention to these types of situations going forward.

The training update during Covid-19:

- New miners must be trained, no exceptions.
- Annual certifications must occur, no exceptions, but due dates extended.
- Annual refresher training has been extended. Work out plans with district such as online training.
- The Part 46 new miner site tour must occur.
- Independent contractor new miner Part 46 training does not have to occur on mine property but must receive site specific hazard training.
- Mine rescue training is not waived at this time, but extensions may be granted.
- First aid and CPR training certifications can be extended if unable to receive the training timely.

Covid-19 Illness update:

It has been 75 days since the last MSHA Stakeholder Meeting. MSHA holds daily calls with Regional Administrators and District Managers who are monitoring the situation at the mines. MSHA is not aware of any person who has contracted Covid-19 at a mine or seen an outbreak at mines and the data supports this finding notwithstanding third party claims. MSHA has received over 125 section 103(g) hazard complaints related to Covid-19. MSHA has issued citations to operators where appropriate during investigations and inspections under the current standards. No confirmed cases among the MSHA inspectorate have been reported. The bottom lines: (1) the mining community is doing better than the national average and lower than other industries such as meat packing and nursery homes. (2) Operators shall report Covid-19 illnesses only if they can demonstrate that the Covid-19 virus was contracted at the mine site. (3) Fit testing prior to respirator use is being extended if not able to obtain timely.

The biggest surprise of the meeting came when MSHA discussed the Spring Regulatory Agenda that was issued on the same day. The Regulatory Agenda lists a proposed rule on quartz that is due in August 2020 but MSHA is running behind. No other details are available at this time.

MSHA stated that Congress and the litigants are trying to impose duties on MSHA to implement an emergency temporary standard. As of the writing of

this article, none of these efforts have been successful, but the D. C. Circuit Court has not completely closed the door.

The MSHA Stakeholder Calls are a good way to listen to and ask questions of MSHA. Operators should become involved and hopefully issues can be brought to the attention of all persons and resolved with the goal of improved safety.

Federal Regulatory Agencies

OSHA/MSHA Rulemaking Agenda Released

By Adele L. Abrams, Esq., CMSP

The federal unified regulatory agenda was released by the Trump administration in early July, mapping out for various federal agencies the rulemaking project status foreseeable over the next 12 months. In a deregulatory environment, it is no surprise that the pending rules for the Occupational Safety & Health Administration (OSHA) add only a few items, while deleting many others from its agenda. There are four new items on OSHA's agenda:

- Interim Final Rule updating procedures for handling whistleblower complaints under Section 11(c) of the OSH Act (due January 2021);
- Reconsideration of whether to include medical removal provisions in OSHA's crystalline silica rule, which was ordered by the US Court of Appeals, DC Circuit, in its 2017 decision upholding the validity of OSHA's 2016 standard (due April 2021);
- Legally mandated updates to the operation of is Maritime Advisory Committee on Safety and Health (MACOSH), to make this a legally mandated committee rather than discretionary, and this item was listed with a June 2020 deadline (overdue); and
- Modification of medical removal provisions in a number of chemical-specific standards (proposed rule due April 2022).

The remainder of items on the agenda mirror those on OSHA's Fall 2019 list, but deadlines have slipped from their earlier pronouncement. The long-awaited Workplace Violence Prevention rule, which was to have been subject to a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel in January 2020, has seen that panel date slide to the end of the year. Another action item relates to modification of fit requirements for PPE in Construction, now due in August 2020, and this appears to be a rule that may see completion before the end of this term.

Finally, OSHA proposes codifying its non-binding October 2018 memorandum to the field, which modified the agency's position, as articulated in the 2016 E-Recordkeeping final rule, concerning safety incentive programs and drug testing. The version which will be proposed in November 2020, will state that 29 CFR 1904.35(b)(1)(iv) – the anti-retaliation provisions of the E-recordkeeping rule -- does not prohibit post-incident drug testing or safety incentive programs. The policy would be adopted via changes to 29 CFR 1904.35(b)(1)(iv) related to implementation of post-incident drug testing and safety incentive programs.

The Mine Safety & Health Administration (MSHA) has a number of items on its agenda, including its Request for Information on ways to reduce exposure to Diesel Particulate in Underground Mines (comment period closes 9/25/2020), and development of its own Crystalline Silica rule (proposed rule due August 2020). MSHA also plans to issue a proposed rule to require Written Safety Programs for Surface Mobile Equipment, Including Powered Haulage

Equipment (proposed rule is overdue, was scheduled for July 2020).

Occupational Safety and Health Administration

Court: Commercial Diving Standard Does Not Cover Fish Feeding

By Gary Visscher, Esq.

In 1977 OSHA adopted a comprehensive safety standard for Commercial Diving Operations, 29 CFR 1910.401-.440. In 1982, the standard was amended to explicitly exempt "scientific diving," if certain conditions were met with regard to the program under which the diving took place. "Scientific diving" is defined as "diving performed solely as a necessary part of a scientific, research, or educational activity by employees whose sole purpose for diving is to perform scientific research tasks." 29 CFR 1910.402

OSHA also added guidelines, in Appendix B, to help determine when diving operations are "scientific diving" and exempt. For example, the guidelines state, "The purpose of the project using scientific diving is the advancement of science; therefore information and data resulting from the project are non-proprietary" and "Scientific divers, based on the nature of their activities, must use scientific expertise in studying the underwater environment."

Fast forward to 2011, when an employee of the Houston Aquarium filed a complaint with OSHA that diving operations at the Aquarium were not in compliance with the OSHA standard for Commercial Diving Operations. OSHA investigated and, after consultation with the OSHA national office, issued a citation and notice of penalty to the Aquarium. The Aquarium contested on the basis that the dives were within the standard's exemption for "scientific diving."

The resulting litigation found that Aquarium divers engage in 3 types of dives: feeding and cleaning; "event" dives, principally intended to entertain visitors; and "mortality dives" to remove dead animals to a laboratory for analysis.

After a hearing, the OSHRC ALJ held that the "mortality dives" were covered by the scientific diving exemption, but that the other two types of dives were outside the exemption. The Aquarium did not appeal the ALJ's finding regarding the "event dives," which it conceded were not scientific dives. On appeal to the Commission, the only issue was whether dives for feeding and cleaning fell within the scientific diving exemption. In a 2 to 1 decision, the Commission held that the exemption for scientific diving did not cover the cleaning and feeding diving operations.

Houston Aquarium appealed the decision to the 5th Circuit Court of Appeals, and in a decision filed on July 15, the Court of Appeals reversed the Commission decision. The Court noted that this was a case of first impression, no previous cases had addressed the issue of whether aquarium dive tasks qualify as scientific diving.

The Court said that the Commission majority had focused too narrowly on the words "whose sole purpose for diving is to perform scientific research tasks" in the standard's definition of scientific diving. The Court said that "rather than focusing on the single term 'research,' the Commission should have interpreted the language of the exemption as a whole."

The Court then cited science-related tasks that divers engaged in during feeding and cleaning dives. For example, during feeding and cleaning dives, divers would observe animal health, behaviors, the type of food they are eating, the type of algae that grows on the windows, and the condition of the exhibit. Abnormal conditions were noted on the Facility Dive Log and communicated to a supervisor or biologist.

The Court also referred to language in the OSHA guidance in Appendix B, which distinguishes between

"the tasks of a scientific diver, which are 'those of an observer and data gatherer,' and the "construction and trouble-shooting tasks traditionally associated with commercial diving.'" The Aquarium divers, said the Court, are in the first category.

Finally, the Court referred to the purpose of the Commercial Diving Operations standard itself: "OSHA's purpose in creating the CDO standard was to improve workplace safety for divers working on dangerous tasks such as construction and drilling, which are not present at the Aquarium." The Court contrasted conditions often present in construction and drilling diving – low visibility, deep water, use of heavy tools and equipment – with those present at the Aquarium. "The alleged violations with which the Aquarium has been charged," the Court wrote, "were not shown to have safety benefits."

Cannabis Corner

Updates Affecting Marijuana in the Workplace

By Adele L. Abrams, Esq., CMSP

Cannabis & the Courts

Maryland: In a 7-0 decision, the Maryland Court of Appeals ruled in July 2020 that police officers lack probable cause to arrest and search someone for marijuana possession simply for smelling the drug, because it is no longer a crime to possess up to 10 grams of marijuana in Maryland. The high court held that enabling policy to arrest and search someone simply due to cannabis odor would violate the Constitution's Fourth Amendment barring unreasonable searches and seizures. Odor alone would not indicate that a person possessed more than 10 grams of the drug. Chief Judge Barbera wrote: "Police officers must have probable cause to believe a person possesses a criminal amount of marijuana in order to arrest that person and conduct a search incident thereto." The court also stressed the heightened expectation of privacy in one's person, as opposed to a vehicle. The decision was issued in *Rasherd Lewis v. State of Maryland*. In Maryland, it is not illegal to possess small amounts of marijuana but it is still a civil offense punishable with a $100 fine. An exception applies for medical cannabis patients who are holders of a valid state-issued card, who have purchased the drug from a licensed state dispensary.

Pennsylvania: A June 2020 decision by the Supreme Court of Pennsylvania considered the issue of whether an individual on probation was in violation by his use of medical marijuana under the state's Medical Marijuana Act. The litigation, *Gass et al. v. Lebanon County*, involved a putative class action by multiple individuals challenging the policy banning such use. The court held that the Lebanon County, PA, policy of barring legal cannabis use by individuals under probation supervision "failed to afford sufficient recognition to the status of a probationer holding a valid medical marijuana card as a patient" and found that the class of individuals was entitled to immunity from punishment, and the county could not deny any right or privilege, solely on the basis of their legal cannabis use. The court decision added: "judges and/or probation officers should have some substantial reason to believe that a particular use is unlawful under the [medical marijuana act] before hauling a probationer into court."

New Jersey: Earlier this year, the NJ Superior Court, Appellate Division, held that an employer is required to reimburse its employee for the worker's use of medical marijuana prescribed for chronic pain following a work-related accident. The decision, in *Hager v. M&K Construction*, is the latest in a series affirming this position in New Jersey, in both the private and public sector. There are currently about a dozen states where employer payment for medical cannabis related to worker's compensation injuries is now required. The

court found there was not a tension between the NJ Medical Marijuana Act and the Controlled Substances Act, because the employer was not being required to possess, manufacture or distribute the drug but only to reimburse its employee for the purchase of medical marijuana; therefore, the employer faced no threat of prosecution as it had alleged. The worker had chronic back pain from work injuries and resulting surgeries, and after 15 years of opiate use, became a medical marijuana patient. The judge, comparing the treatment options for the worker's pain – opiates or medical cannabis – concluded that the benefits of medical marijuana were superior to the use of opioids, and medical marijuana was in the patient's best interest.

Cannabis on the Ballot

Elections are coming (we think) in November, and medical and recreational cannabis ballot initiatives are growing like weeds. The following are examples of what to expect at the polls:

Arizona: Initiative 23 is on the ballot, and would legalize adult use of marijuana, with the right to purchase and possess up to one ounce and to grow up to six plants for personal use. It also includes criminal record expungement for marijuana charges, and social equity provisions. A recent survey showed that 62 percent of likely voters supported adult legalization, but with interesting party divisions: most Democrats (75%) and Independents (70%) support legalization, but only 48 percent of Republicans support the initiative. Given that Arizona is a swing state, the ballot initiative could attract greater voter turnout with impact on national races.

Arkansas: Arkansans for Cannabis Reform, which was gathering signatures for an adult use marijuana initiative, got a boost in May when a judge held that the Secretary of State was obligated to accept signatures that were not collected in person or notarized. However, it was not clear whether the activists could reach the mandatory 90,000 signatures in time to qualify for the ballot.

California: The California Cannabis Hemp Heritage Act would change the state's licensing and tax rules to expand access to marijuana, and the request to allow electronic signature gathering is still pending.

Delaware: An employee who uses medical cannabis in compliance with state law to heal from a work-related injury may be denied workers' compensation, according to a July 2020 ruling by the Delaware Superior Court. In Nobles-Roark v. Back Burner, the court denied the worker's claim for medical marijuana related reimbursement costs, holding the weight of evidence did not find the treatment to be "reasonable and necessary." It rejected the state General Assembly's finding that medical marijuana can effectively treat some patients in holding that whether medical treatment is reasonable and necessary is an individualized inquiry.

Idaho: The Idaho Cannabis Coalition initially suspended its campaign due to COVID-19, although the group was only 15,000 signature short of qualifying for the ballot. The medical marijuana ballot initiative may have new life, however, after a federal judge held that a different campaign was entitled to accommodations due to COVID affecting its signature gathering abilities. Stay tuned!

Mississippi: There are two competing measures that have qualified for the November ballot. The first, Initiative 65, was a citizen initiative that would allow qualified patients with debilitating medical conditions to use medical marijuana, and to access up to 2.5 ounces per 14-day time period. The second, HC 39, was legislature-approved and would establish a state medical marijuana program for qualified persons, but it would prohibit patients from smoking whole plant marijuana.

Missouri: The group Missourians for a New Approach suspended their ballot campaign after COVID limited their ability to obtain in-person signatures. At the time of suspension, about half of the necessary signatures had been collected on a measure to permit adult purchase and possession of recreational marijuana

from licensed retail outlets, and to grow up to three plants for personal use.

Montana: A proposal was submitted to the State in January 2020 and obtained permission to collect signatures to qualify for the ballot. After an interruption due to COVID, activists sued the state and argued that preventing electronic signature gathering was unconstitutional. In-person signature gathering resumed in May and sufficient signatures were submitted to place the initiative on the ballot. There are two complimentary measures, which would legalize and regulate personal use and commercial production, and retail sale of marijuana to adults age 21 and older.

Nebraska: Nebraskans for Medical Marijuana were able to resume signature gathering, after initial disruption, and in July submitted 182,000 signatures (only 130,000 were needed) to qualify for the November ballot. The measure is a constitutional amendment that allows qualifying patients, which physician's approval, to access medical marijuana and to "discreetly" grow marijuana for therapeutic use.

New Jersey: A ballot question will be offered to allow regulated cannabis sales for persons at least 21 years of age. The state medical cannabis program would oversee the new personal use cannabis market if the initiative prevails. A recent poll suggested that 61 percent of respondents support the proposal.

North Dakota: Legalize ND, the group behind the unsuccessful 2018 adult recreational cannabis use initiative, tried again in 2020. As of June, it suspended its campaign due to inability to gather in-person signatures due to COVID. The group's focus has shifted to preparation for a 2022 measure.

Oklahoma: SQ 807, an adult use initiative, was in jeopardy after activists had to suspend signature-gathering, but in June the Oklahoma Supreme Court ruled that signature gathering could continue. It is unclear whether sufficient signatures can be obtained in time to place the initiative on the ballot.

South Dakota: Two different measures have qualified for the ballot. The first is a constitutional amendment on adult use, allowing the state to legalize, regulate, and tax marijuana, and to ensure access for medical use. The second is Initiative 26, limited to legalizing marijuana for medical use, with patients permitted to possess up to three ounces of marijuana or to grow up to three plants for therapeutic use.

Cannabis in Nursing Home Patients

An Israeli study has found that the use of medical cannabis reduces the need for prescription medications among elderly nursing home patients, according to the journal Advances in Health and Behavior. The researchers looked at a cohort of two dozen patients over a year, all of whom were dependent on nursing home care. They found all patients experienced immediate relief including pain reduction, increased appetite, improved mood and sleep, and dramatic improvements in spasticity symptoms. After being given a choice from four strains of cannabis, the elderly patients were able to discontinue 39 prescription drugs in total.

2020 SPEAKING SCHEDULE

ADELE ABRAMS:

- 8/12: BLR half-day master class on OSHA Recordkeeping & COVID-19 Issues (V)
- 8/26: Premier Learning Solutions webinar on OSHA Enforcement & Initiatives (V)
- 9/1: BLR webinar on Legally Effective OHS Audits (V)
- 9/3: Alliance of Hazardous Material Producers, Keynote Speaker on OSHA Update and Election Outlook (V)
- 9/11: Chesapeake Region Safety Council, MSHA 101 Workshop, Baltimore, MD (L)
- 9/11: Pioneer Learning Webinar on Avoiding Whistleblower Claims (V)
- 9/17: ASSP Region VI PDC, Presentation on OSHA Update (V)
- 9/24: Premier Learning Solutions, webinar on COVID, OSHA and Returning to Work (V)
- 9/25: Pioneer Learning Webinar on Workplace Violence and Employment Discrimination (V)
- 10/6: National Electrical Contractors Association safety conference, presentation on OSHA/MSHA Update, Chicago, IL (L)
- 10/20: Avetta webinar on Substance Abuse Prevention & Drug Testing (V)
- 10/28: BLR webinar on Confined Space Safety (V)
- 11/4: ASSP webinar, OSHA/MSHA crystalline silica update (V)
- 11/4: ASSP webinar, OSHA/MSHA crystalline silica update (V)

KEY: (V) = Virtual or Webinar, (L) = Live, In-Person